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SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO, CENTRAL DIVISION

In the Matter of: Four Sealed Search Warrants. AND RELATED ACTION. PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS WESSON, Defendant.	W04912037-9 W04912038-7 W04912039-5 W04912450-4 CASE NO. F049017856 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT RECORDS** HEARING DATE: May 20, 2004 TIME: 8:30 a.m. DEPT: 53 (Honorable R. L. Putnam) Estimated time for hearing: 30 minutes

The McClatchy Company, doing business as *The Fresno Bee* ("*The Fresno Bee*"), submits this Reply Memorandum of Points and Authorities in Support of Motion to Unseal Search Warrant Records in the above action.[1]

[1] *The Fresno Bee* files contemporaneously with this reply memorandum its motion to strike the People's response in opposition to motion to unseal search warrant records on the ground that it was untimely. (See *The Fresno Bee*'s Motion to Strike People's Response in Opposition to Motion to Unseal Search Warrant Records.)

I. INTRODUCTION.

The opposition to *The Fresno Bee*'s motion ignores clear California and federal authorities which compel the unsealing of the search warrant records in this case. First, Penal Code section 1534 states unequivocally that the documents and records relating to the warrants shall be opened to the public after execution and return. Second, the opposition, by parties who have the burden to justify the sealing of search warrant documents, present no evidence which enables the court to find facts establishing the conditions under which judicial records may be sealed. Third, even if the search warrant documents contain inadmissible evidence, such inadmissible evidence will not in itself support sealing of search warrant records.

II. PENAL CODE SECTION 1534 AND CONSTITUTIONAL AUTHORITIES REQUIRE THE UNSEALING OF THE SEARCH WARRANT RECORDS.

Penal Code section 1534, and its recent legislative history set forth in *The Fresno Bee*'s request for judicial notice, clearly establish that the Legislature meant what it said in requiring that search warrant documents be opened to the public as a judicial record after the execution and return of the warrant. (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 114-115 [7 Cal.Rptr.2d 841], citing *Estate of Hearst* (1977) 67 Cal.App.3d 777, 782, 784 [136 Cal.Rptr. 821] ["Traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals."]; *People v. Tockgo* (1983) 145 Cal.App.3d 635, 642 [193 Cal.Rptr. 503] [search warrant affidavit is a public document under Penal Code section 1534(a)].)

Neither the State nor the defense dispute or even address the clear legislative intent to make public access to search warrant records the statutory criminal law of this state.

III. NO EVIDENCE IS PRESENTED WHICH WOULD SUPPORT THE SEALING OF THE SEARCH WARRANT RECORDS.

Neither the defense nor the prosecution submits any evidence whatsoever to this court which would allow the court to make the findings required by California Rule of Court 243.1 to seal the search warrant documents. Neither submitted any opposition to *The Fresno Bee*'s motion other than memoranda of authorities and argument.[2] It is clear that speculation and conjecture are not substitutes for facts. As pointed out in *The Fresno Bee*'s moving points and authorities at page 8, all search warrant documents could be sealed indefinitely and the public's rights under Penal Code section 1534 would be eviscerated by general statements of potential prejudice. (*United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1169; Cal. Rules of Court, rule 243.1.)

IV. THE FACT THAT SEARCH WARRANT DOCUMENTS MAY INCLUDE INADMISSIBLE EVIDENCE WILL NOT SUPPORT SEALING OF THOSE RECORDS.

In *Press-Enterprise Company v. Superior Court (Press-Enterprise II)* (1986) 478 U.S. 1 [92 L.Ed.2d 1, 106 S.Ct. 2735], the supreme court recognized that "publicity concerning the proceedings at a pretrial hearing . . . could influence public opinion against the defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial," but then continued to observe that this risk alone is not sufficient to justify closure:

> [T]his risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.

(*Id.* at p. 14, emphasis added.)

Similarly, in *United States v. Brooklier, supra*, the Ninth Circuit specifically held that the public's right of access included access to a defendant's motion to suppress. (685 F.2d at p.

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[2] *The Fresno Bee* has not seen and has no knowledge of documents submitted previously in connection with the various applications to seal the search warrant records here.

1171.) The court further held that the policies requiring public access are clearly implicated in suppression motions as well. (*Id.* at p. 1171.)

Press-Enterprise II also held that a defendant must demonstrate that reasonable alternatives to closure cannot adequately protect fair trial rights, expressly endorsing voir dire of jurors to weed out those who may have been adversely influenced by publicity. (478 U.S. at p. 14.) Recognized alternatives to closure of hearings or sealing of records would be change of venue, postponing trial until the effect of publicity subsides, conducting searching voir dire of jurors, and giving clear and emphatic instructions to the jury. (*Nebraska Press Association v. Stewart* (1976) 427 U.S. 539, 563-564 [49 L.Ed.2d 683, 96 S.Ct. 2791.) In *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 625-626 [143 Cal.Rptr. 717], the supreme court stated that postponement and change of venue "are not entirely satisfactory remedies" but noted that the United States Supreme Court has repeatedly recognized "the salutary functions served by the press in encouraging the fairness of trials and subjecting the administration of justice to the beneficial effects of public scrutiny." The court then continued: "It has been held these measures to be favored over direct restraints on the press."

A. <u>Searching Voir Dire Of Prospective Jurors</u>.

In order to justify restraint on judicial records, the court must make a specific finding that a searching voir dire is not a reasonable, less restrictive alternative in this case. Absent such a finding, the court's order cannot pass constitutional muster.

Press-Enterprise II and subsequent cases have repeatedly recognized that although sometimes "cumbersome" voir dire is often a less restrictive reasonable alternative. "Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." (*Press-Enterprise II*, *supra*, at p. 14.)

With respect to the effectiveness of voir dire as a less restrictive alternative to vitiate the effects of pretrial publicity, the court observed in *Seattle Times v. United States District Court for Western District of Washington* (9th Cir. 1988) 845 F.2d 1513, 1518:

> The district court, however, to easily dismiss the likelihood that an impartial jury could be empaneled through searching voir dire and the use of peremptory challenges. The court failed to consider the size of the Seattle metropolitan area from which a jury may be selected. The

> issue is not whether a potential juror is ignorant of the case, but whether he has a preconceived idea of the defendant's guilt or innocence.

Searching voir dire would obviously an effective and far less constitutionally burdensome alternative to sealing court records in this case.

B. Emphatic Jury Instructions.

The supreme courts of the United States and California have recognized emphatic jury instructions as effective alternatives. (*Press-Enterprise II*, *supra*, at pp. 13-14; *Brian W.*, *supra*.) Jurors can be expected to take their oaths seriously and follow the court's instructions, and it is without foundation to believe that jurors will disregard the court's statements about confining their deliberations to the evidence presented in court and not in the media or elsewhere.

The courts have repeatedly noted that pretrial publicity even if pervasive, does not inevitably result in the tainting of a jury pool, particularly where jurors are drawn from a substantial population. (*Tribune Papers West, Inc. v. Superior Court* (1985) 172 Cal.App.3d 443, 458-460 [218 Cal.Rptr. 518].) A list of defendants who have been acquitted despite wide-ranging publicity, even of arguably incriminating evidence, is lengthy: John Mitchell, John DeLorean, the McMartin defendants, Rodney King defendants, O. J. Simpson, and others.

C. Change Of Venue.

Press-Enterprise II requires that less burdensome alternatives such as change of venue must be utilized where alternatives will adequately protect the defendant's fair trial rights. (*Press-Enterprise II*, *supra*, at p. 14; *Seattle Times v. District Court*, *supra*, 845 F.2d at p. 815 [". . . if voir dire fails to empanel an impartial jury, the options of a continuance or change of venue are still open."

V. INVESTIGATORY EFFICIENCY IS A CONSTITUTIONALLY INSUFFICIENT BASIS FOR INFRINGEMENT OF FIRST AMENDMENT PUBLIC ACCESS RIGHTS.

The State may argue that the sealing is required based upon a conclusory allegation that an ongoing law enforcement investigation would be compromised. However, such an allegation cannot justify the maintenance of the sealing in this case for two reasons. First, no evidence was offered, that there is an ongoing investigation or that an ongoing investigation would be compromised by press and public access to the search warrant documents in this case. Second, no further compromise of any ongoing investigation is possible because the defendants are already in possession of the search warrant documents. It is only the press and the public who are not aware of the c

VI. AFTER CHARGES ARE FILED AGAINST A CRIMINAL DEFENDANT, THERE ARE NO OVERRIDING CONSIDERATIONS TO SUPPORT SEALING OF SEARCH WARRANT RECORDS.

Following the execution of warrants or the filing of criminal charges against defendants, the contents of court files containing search warrant information have historically been open to public scrutiny. (*In re Search Warrant for Secretarial Area* (8th Cir. 1988) 855 F.2d 569, 573; Penal Code, § 1534.) The reason is obvious. The evils inherent in pre-arrest or pre-execution disclosure are no longer present once the warrant has been executed and the criminal defendant has been charged.

Here, the search warrants and arrest warrants have been fully executed, criminal charges have been filed, the defendant has been held to answer, and the defendant has been arraigned in superior court. Most importantly, the defendant is in possession of the information sought to be kept secret. Only the press and the public are being denied access to the search warrant information. Obviously, the concerns of destruction of evidence and flight from the jurisdiction do not exist in the current context of this case.

VII. CONCLUSION.

Based on the foregoing reasons, the court should order the search warrant files in this case unsealed.

DATED: May 18, 2004.

DIETRICH, GLASRUD, MALLEK & AUNE

BY: _____
BRUCE A. OWDOM
Attorneys for The McClatchy Company, doing business as *The Fresno Bee*

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am 18 years of age or over and not a party to the within action; my business address is 5250 North Palm Avenue, Suite 402, Fresno, California, 93704.

On May 18, 2004, I served the within document described as **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT RECORDS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at Fresno, California, addressed as follows:

SEE ATTACHED SERVICE LIST.

_____ (BY MAIL) depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

__X__ (BY MAIL) placing the envelope for collection and mailing on the date and at my address shown above following our ordinary business practices. I am completely familiar with Dietrich, Glasrud, Mallek & Aune's practice of collection and processing of correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in declaration.

_____ (BY OVERNIGHT MAIL SERVICE) by placing the envelope for collection following our ordinary business practices for collection and processing correspondence for mailing by express or overnight mail to the person(s) by whose name an asterisk is affixed.

__X__ (BY FACSIMILE) In addition to service by mail as set forth above, the person(s) by whose name an asterisk is affixed was also forwarded a copy of said documents by facsimile.

_____ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 18, 2004, at Fresno, California.

Lori L. Bailey

LORI L. BAILEY